Since the question involved in *Casdagli* v. *Casdagli* was jurisdictional, and not one calling for the application of foreign law, the doctrine of *renvoi* would not have enabled the court to solve it. But the principle which it lays down is, it is submitted, equally applicable to the *renvoi* cases, and explains the results reached in such cases in a more realistic and logical manner than that employed by the jurists advocating *renvoi*.

CONVICTION OF AN ACCESSORY AFTER ACQUITTAL OF THE PRINCIPAL.—At common law it was said that the accessory "followed his principal like a shadow",[1]—without a principal there could be no accessory.[2] No accessory could be tried and convicted unless the principal felon had been previously either convicted or outlawed, and evidence thereof given to the jury, or unless the principal be charged in the same indictment with the accessory and tried at the same time, in which latter case the jury must inquire first into the guilt of the principal, and if they found him not guilty, then acquit the accessory; but if they found him guilty, they must then inquire into the guilt of the accessory.[3] To this there was but one exception,—where the accessory consented to be tried before the principal. Even then proof of the guilt of the principal was indispensable, and upon the conviction of the accessory, judgment against him had to be suspended until the principal had been prosecuted and found guilty. But if the accessory were acquitted of the charge, the acquittal was good and the accessory discharged.[4] It followed, therefore, that anything which prevented the conviction[5] of the principal, such as his death,[6] or standing mute,[7] or being admitted to the benefit of clergy,[8] or a pardon before conviction,[9] prevented the trial of the accessory. The record of the acquittal of the principal was consequently an absolute bar to the prosecution of the accessory.[10] Since, however, there was an added

[1]Bishop, New Criminal Law (8th ed.) § 666.

[2]Commonwealth *v.* Phillips (1820) 16 Mass. *423.

[3]1 Hale, Pleas of the Crown 624; see State *v.* Duncan (1845) 28 N. C. 98; United States *v.* Hartwell (1869) 26 Fed. Cas. No. 15318; *Ex parte* Bowen (1889) 25 Fla. 214, 6 So. 65.

[4]1 Hale, *op cit.* 623; see Commonwealth *v.* Andrews (1807) 3 Mass. 126; State *v.* Chittem (1828) 13 N. C. 49; *Ex parte* Bowen, *supra.*

[5]At common law a judgment of conviction of the principal felon, and not merely the verdict of a jury as to his guilt, was prerequisite. State *v.* Duncan, *supra*; Daughtrey *v.* State (1903) 46 Fla. 109, 35 So. 397.

[6]Commonwealth *v.* Phillips, *supra*; see Moore *v.* State (1899) 40 Tex. Cr. 389, 51 S. W. 1108; but *cf.* Self *v.* State (1873) 65 Tenn. 244.

[7]See Rex *v.* Burridge (1735) 3 P. Wms. *439, *485; State *v.* Duncan, *supra.*

[8]*Supra,* footnote 7.

[9]*Supra,* footnote 7. But not a pardon after conviction. Commonwealth *v.* House (1899) 10 Pa. Super. Ct. 259. Where a judgment of conviction against a principal was reversed, the accessory was *ipso facto* discharged. Ray *v.* State (1882) 13 Neb. 55, 13 N. W. 2.

[10]McCarty *v.* State (1873) 44 Ind. 214; see *Ex parte* Bowen, *supra*; State *v.* Jones (1888) 101 N. C. 719, 8 S. E. 147; *cf.* United States *v.* Crane (1847) 25 Fed. Cas., No. 14888; but *cf.* Regina *v.* Pulham (1840) 9 C. & P. 280.

issue in the prosecution of the accessory, the record of the conviction of the principal was *prima facie* evidence of the guilt of the principal of the crime alleged,[11] which could be rebutted by the accessory,[12] and it was no evidence of the guilt of the accessory.[13] Since the crime of accessory was not a substantive one, but wholly ancillary to that of principal, the common law revolted at what it considered the absurdity of an accessory without a principal.[14]

The manifest failure of justice in permitting one "whose will contributed to the commission of a felony committed by another while himself too far away to aid in the felonious act", as the accessory before the fact was defined,[15] to escape punishment merely because his principal was without the pale of the law,[16] caused statutes to be adopted in many jurisdictions providing that the one acting (the principal), the one present, aiding and abetting (the accomplice), and the one absent, aiding and abetting (the accessory before the fact) be equally guilty. All of these statutes permitted the accessory before the fact to be indicted and tried independently of, and before, the trial of the principal.[17] Some of these were construed merely to permit the trial and conviction of the accessory without the preliminary of the trial and conviction of the principal, but required the state still to show the guilt of the principal as a condition precedent to the conviction of the accessory.[18] Others were held to make the accessory before the fact guilty of a substantive crime, and in effect a principal, and permitted his conviction irrespective of the guilt of the principal.[19]

[11]State *v.* Chittem, *supra;* Anderson *v.* State (1879) 63 Ga. 675; Cantrell *v.* State (1913) 141 Ga. 98, 80 S. E. 649; State *v.* Fiore (1913) 85 N. J. L. 311, 88 Atl. 1039. The state may introduce evidence *aliunde*. See Commonwealth *v.* House, *supra;* Martin *v.* State (1894) 95 Ga. 478. That judgment of conviction of the principal is indispensable if the principal has been tried first, see State *v.* Duncan, *supra*. That judgment is conclusive as to the fact of conviction of the principal, see State *v.* Chittem, *supra*; Anderson *v.* State, *supra*.

[12]See Cantrell *v.* State, *supra;* Rex *v.* Smith (1783) 1 Leach C. C. 323.

[13]See Thompson *v.* State (1914) 16 Ga. App. 832, 84 S. E. 591; Keithler *v.* State (1848) 18 Miss. 192; Anderson *v.* State, *supra*.

[14]4 Bl. Comm. *323; see Smith *v.* State (1872) 46 Ga. 298.

[15]1 Bishop, *op. cit.* § 673.

[16]See State *v.* Duncan, *supra*; State *v.* Ludwick (1868) 61 N. C. 401.

[17]But *cf.* footnote 20, *infra*.

[18]Burn's Ann. Ind. Stat. (1914) § 2095: "Every person who shall aid or abet in the commission of a felony, or who shall counsel, encourage, hire, command, or otherwise procure a felony to be committed, may be charged by indictment or affidavit, tried and convicted in the same manner as if he were a principal, either before or after the principal offender is charged, indicted, or convicted."

In Baxter *v.* People (1845) 7 Ill. 578, the court, referring to a similar statute, said, "Under our statute, an accessory may be indicted and punished as principal, and in such a case it would be necessary for the prosecution to make out the guilt of the principal, before the jury could find the defendant guilty of the murder by being accessory to it."

[19]In New York, the jurisdiction of the principal case, the statute (Consol. Laws, c. 40, § 2) reads as follows: "Principal. A person concerned in the commission of a crime, whether he directly commits the act constituting the offence or aids and abets in its commission, and whether present or absent, and a person who directly or indirectly counsels, commands, induces or procures another to commit a crime, is a 'principal'."

In People *v.* Bliven (1889) 112 N. Y. 79, 19 N. E. 638, the court said,

Still others were construed, in effect, as giving the state an election whether to treat the accessory in his common law capacity or as a substantive criminal; if the former, the procedure followed the first line; if the latter, the second.[20] Consequently, while under the first construction such statutes authorized the conviction of the accessory before or after the conviction of the principal, they did not authorize his conviction after the acquittal of the principal; and, therefore, the acquittal of the principal was still an absolute bar to the conviction of the accessory,[21] whereas the record of the conviction of the principal was still *prima facie* evidence of the guilt of the principal.[22] As to the second construction, since the accessory was now a principal, the state need no longer prove the guilt of the principal to make out its case against the accessory, and consequently the record of the trial of the principal, if it had taken place, whether it lead to conviction or acquittal, was wholly irrelevant.[23]

These statutes are in general conspicuously silent as to the accessory after the fact,—the one who harbored a felon, knowing him to be such, or rendered him any other assistance so as to enable him to elude punishment.[24] It is true that the accessory after the fact is now under some statutes a substantive criminal, in the sense that he may be tried and convicted before the trial and conviction of his

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"The purpose and effect of the section are to abolish the distinction which heretofore existed in cases of felony between a principal and an accessory before the fact, the principal being present and either committing the act himself or aiding in its commission, and the accessory before the fact being absent, but counseling and procuring its commission. The case of an accessory before the fact has now, by means of this section, been made the case of a principal, and he occupies, therefore, the same position in the case of felony as such an individual heretofore occupied in cases of treason and of misdemeanor."

[20]Florida Compiled Laws (1914) § 3179: "Whoever counsels, hires, or otherwise procures a felony to be committed, may be indicted and convicted as an accessory before the fact, either with the principal felon or after his conviction, or may be indicted and convicted of a substantive felony, whether the principal has or has not been convicted or is or is not amenable to justice."

Under a similar statute, it was declared in *Ex parte* Bowen, *supra*, that the first part of such statute preserved the common law, and that it was only where the accessory was indicted as on a substantive felony that he could be convicted without reference to the conviction of the perpetrator. It seems that under such statute one indicted as accessory could not be convicted before his principal, and to this extent, perhaps, the generalization that an accessory before the fact may always be tried before his principal should be limited. *Cf.* State *v.* Bryson (N. C. 1917) 92 S. E. 698.

[21]McCarty *v.* State, *supra*; State *v.* Ludwick, *supra*; State *v.* Jones, *supra*; see Baron v. People (N. Y. 1851) 1 Parker Crim. R. 246; May, Crimes (3rd ed.) § 70. And even where judgment of conviction has been rendered against the accessory, if the principal be thereafter acquitted, the accessory must be discharged. McCarty *v.* State, *supra*.

[22]State *v.* Moseley (1884) 31 Kan. 355, 2 Pac. 782; see State *v.* Gleim (1895) 17 Mont. 17, 41 Pac. 998.

[23]Regina *v.* Hughes (1860) Bell's C. C. 242 (subsequent acquittal of principal); People *v.* Bearss (1858) 10 Cal. 68 (prior conviction of principal); see Steely *v.* Commonwealth (1909) 132 Ky. 213, 116 S. W. 714; Rooney *v.* United States (C. C. A. 1913) 203 Fed. 928 (prior acquittal of principal).

[24]Bishop, *op. cit.* § 692.

principal;[25] but this procedural change would seem to be the only deviation from the common law.[26] This divergence can best be explained by the fact that there was felt to be a fundamental distinction between the accessory before the fact and the accessory after the fact; that the former is in reality an aider and abettor, whose will contributes to the fact itself, whereas the guilt of the other is scientifically independent of the fact.[27] In addition to the fact that these statutes contain no word permitting the conviction of the accessory after the fact subsequent to the acquittal of his principal, it seems that the reason for the change by which such result was effected in the case of the accessory before the fact is entirely absent in the case of an accessory after the fact; that while one may well aid and assist in the preparation of a crime, and incur punishment thereby though the actual perpetrator thereof escape punishment, it is still impossible to harbor and conceal a felon when such person has been adjudicated not to have been a felon.[28] Hence, it would seem, that where the accessory after the fact is tried before the conviction of his principal, the state must still prove the commission of the crime and the harboring and concealing.[29] Furthermore, when the accessory after the fact is tried after the conviction of his principal, the record of the conviction should be taken as *prima facie* evidence of the principal's guilt.[30] Where, however, the accessory after the fact is tried after the acquittal of his principal, the record of acquittal should be taken as conclusive that the principal is not a felon, and

[25]The crime of accessory after the fact has by no means been ignored by the codifiers. Under the New York Penal Law (Consol. Laws, c. 40, § 2) it is defined as follows: "Accessory. A person who, after the commission of a felony, harbors, conceals, or aids the offender, with intent that he may avoid or escape from arrest, trial, conviction, or punishment, having knowledge or reasonable ground to believe that such offender is liable to arrest, has been arrested, is indicted or convicted, or has committed a felony, is an 'accessory' to the felony." And in § 1934 it is provided that "an accessory to a felony may be indicted, tried, and convicted * * * whether the principal felon has or has not been previously convicted, or is or is not amenable to justice, and although the principal has been pardoned or otherwise discharged after conviction." It is submitted, however, that the nomenclature of the New York statute which designates the common law accessory before the fact as "principal" and the common law accessory after the fact as "accessory" is significant. See also United States *v.* Crane, *supra.*

[26]See State *v.* Davis (1883) 14 R. I. 281.

[27]Bishop, *op. cit.* § 592; 4 Bl. Comm. *40.

[28]It would seem that the reasoning of the court in State *v.* Ludwick, *supra,* footnote 16, in respect to accessory before the fact is particularly applicable to the case of accessory after the fact: "This statute alters the common law, and puts out of the way the necessity of a prior conviction and attainder of the principal felon, but it has not even the most remote bearing upon a case where the person charged as principal felon has been tried and acquitted. That is left as at common law, and the notion that when it is decided by the judgment of the law that no felony has been committed, and that the person charged as the principal felon is not guilty, one charged as being accessory * * * can be tried and convicted, is out of the question, for there is no fact and no principal."

[29]United States *v.* Crane, *supra*; see Daughtrey *v.* State, *supra*; *cf.* Edwards *v.* State (1887) 80 Ga. 127, 4 S. E. 268.

[30]West *v.* State (1889) 27 Tex. Cr. 472; see United States *v.* Hartwell, *supra*; Thompson *v.* State, *supra.*

consequently that the accessory is not guilty as charged,[31] especially since the state, by the principle of second jeopardy, can never again inquire into the guilt of the principal. There is no injustice in the position that a record of acquittal shall be conclusive against the state, whereas a record of conviction shall be only *prima facie* evidence against the accessory. The state in its action against the principal had full opportunity to call and examine witnesses, and should be bound by an unfavorable result, involving the precise issue, to which it was party; whereas the accessory had not such opportunity to be heard, and should not, therefore, be prejudiced by a result unfavorable to him.[32] In the light of this analysis, it is submitted that the court, in the recent case of *People* v. *Beintner* (Sup. Ct. 1918) 168 N. Y. Supp. 945, which declared that in the trial of an accessory after the fact subsequent to the acquittal of his principal, the record of the acquittal of the principal was not admissible for any purpose, and which held that such acquittal was not a bar to the prosecution of the accessory, was in error, and that the indictment in that case against the accessory should have been dismissed.

THE CONFLICT IN THE CONCURRENT OPERATION OF STATE AND FEDERAL TAXES.—Inheritance taxation has come to be relied upon, both in this country and abroad, as an effective and just method of raising revenue. This mode of taxation has been recognized as a fitting instrument especially in the hands of the state governments because of their control over the descent and distribution of property upon death.[1] The federal government, nevertheless, imposed such taxes in the past[2] and, by the Act of September 8, 1916,[3] has again entered the field. The question obviously arises: to what extent shall each government recognize the tax of the other for the purpose of assessing its own?

In the first instance, it is necessary to examine the nature of in-

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[31] *Supra,* footnote 28.

[32] Spencer, J., in Maybee *v.* Avery (N. Y. 1820) 18 Johns., *352, expresses this idea by way of *dictum* as follows: "It is, undoubtedly, a rule, that to give a verdict, and judgment thereon in evidence, it must be upon the same point, and between the same parties or privies. The reason why it must be between the same parties is, that otherwise a man would be bound by a decision in which he was not at liberty to cross-examine the witnesses; and generally, the benefit of the rule is mutual; and one who is not a party to the cause, and would not be bound by the verdict, if against him, cannot avail himself of it. One of the exceptions to the rule is, that where the matter in dispute is a question of public right, in that case, all persons standing in the same situation as the parties, are affected by it. It appears to me that a verdict on an indictment forms another exception, and upon the same principle." *Cf.* State *v.* Chittem, *supra.*

[1] See Mager *v.* Grima (1850) 49 U. S. 490; Eyre *v.* Jacob (1858) 55 Va. 422; State *v.* Alston (1895) 94 Tenn. 674, 30 S. W. 750; *In re* Joyslin (1903) 76 Vt. 88, 56 Atl. 281.

[2] Act of July 6, 1797, 1 Stat. 529, c. 11; Act of July 1, 1862, 12 Stat. 485, c. 119; Act of June 30, 1864, 13 Stat. 285, c. 173; Act of June 13, 1898, 30 Stat. 464, c. 448. For a brief account of federal inheritance taxation, see Knowlton *v.* Moore (1900) 178 U. S. 41, 50, 20 Sup. Ct. 747.

[3] Estate Tax, 39 Stat. 777, c. 463; amended by an increase of rates, Act of March 3, 1917, 39 Stat. 1002, c. 159; amended by new rates in addition to those already existing. Act of October 3, 1917, First Sess. 65th Congress 324, c. 63.